79-6866

RECEIVED
JUN 28 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF
THE UNITED STATES

GERALD MASONE,

Appellant,

- against -

PHYLIS MASONE,

Respondent.

NOTICE OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavits of GERALD MASONE, the appellant herein, sworn to on June 26, 1980 and DANIEL K. ETTINGER, ESQ., the attorney for the appellant, sworn to June 26, 1980, the undersigned moves this Court pursuant to its rules for permission to proceed in forma pauperis with respect to the appeal herein.

Dated: Bronx, New York
June 26, 1980

Yours, etc.

DANIEL K. ETTINGER, ESQ.
Attorney for Appellant
10 West Fordham Road
Bronx, New York 10468
212-298-8306

TO: DAVID ARENS, ESQ.
Attorney for Respondent

HON. ROBERT ABRAMS
Attorney General
State of New York

SUPREME COURT
OF THE UNITED STATES

GERALD MASONE,

Appellant,

- against -

PHYLIS MASONE,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF THE BRONX) ss.:

GERALD MASONE, being duly sworn, deposes and says that:

1. I am the appellant in this action and I make this affidavit in support of my motion for permission to proceed in forma pauperis.

2. I reside at 1463 Waring Avenue, County of the Bronx, City and State of New York.

3. I am a retired disabled fireman without current income other than my pension less the alimony support payments currently being deducted from my disability pension.

I have expended all my funds in the promulgation of the litigation herein.

A full and comprehensive statement of my financial status was presented in a similar motion to the Appellate Division of the Supreme Court of the State of New York which

granted me permission to proceed as a poor person. A copy of said order is attached and made a part hereof.

I am still unemployable and my physical state has deteriorated and I am unable to afford the costs of an appeal.

As previously submitted to the Appellate Division in the motion supra, I am detailing my financial indigent status.

Your deponent owns a one-family home with my present wife which was purchased while I was still employed by the City of New York and which is encumbered with a $16,000.00 mortgage as well as a judgment of approximately $15,000.00. The house is approximately 50 years old and has an assessed valuation for tax purposes of only $18,000.00. The current market value of the house would probably be less than $35,000.00. Due to the mortgage and judgment, I am unable to sell or refinance the house in order to raise funds.

I own a 1977 Ford on which there is a loan and a lien in the amount of $3,000.00, and I also own a five year old motorcycle. Both the mortgage and car payments are paid out of my disability pension, which is my only source of income, and out of which all of my living expenses and those of my present wife and stepdaughter. After monthly expenses, my disability pension of $1,803.00 per month is totally insufficient for myself and my family to live on.

By order of the Supreme Court of the State of New York, County of the Bronx, the sum of $100.00 is being deducted from

the pension and paid to the respondent. In addition, it was also ordered that I was directed to pay a lump-sum of $3,000.00 to the respondent and the sum of $500.00 to her attorney. In addition thereto, the Supreme Court of the State of New York, County of the Bronx, entered judgment against me for an additional sum of approximately $12,000.00.

The following is an accurate tabulation of my monthly expenses:

MORTGAGE	$ 236.00
GAS & ELECTRIC	100.00
OIL	150.00
TELEPHONE	45.00
CAR PAYMENT	136.00
CAR INSURANCE	60.00
CAR REPAIR	10.00
GAS & OIL (CAR)	63.00
FOOD	400.00
DRY CLEANING	40.00
NEWSPAPER & MAGAZINES	10.00
CLOTHING	60.00
DOCTOR	50.00
DENTIST	50.00
LIFE INSURANCE	125.00
HOSPITALIZATION	7.70
CITY INSURANCE	3.00
ENTERTAINMENT	120.00

HOUSE REPAIR & MAINTENANCE ($40.00 yr. boiler, $250.00 paid outside, $100.00 yr. blacktop, $60.00 misc.; $300.00 for snow removal & gardening)	$ 75.00
CLUB DUES	25.00
LEE DeCICCO(personal loan)	50.00
GIFTS (birthdays, weddings, showers, engagements, holiday buying, etc.)	85.00
TOTALLING	$ 1,900.70

My monthly negative balance can run as high as $97.70, not inclusive of alimony, support and maintainence, which if included make an actual negative balance of $505.00 per month. These figures do not reflect the further deminishment of my financial situation due to the rising cost of living for a person on a fixed income nor the expense of counsel fees.

These figures do not demonstrate the upkeep of my home. It is ironic that in today's society where an individual is receiving a disability pension of $1,803.00 monthly that he is reduced to indigency.

My liquid assets amount to exactly $0.00.

If the Court does not grant my herein motion, my constitutional right of appeal will be severely prejudiced. Filed together herewith are my notice of appeal and jurisdictional statement.

WHEREFORE, your deponent respectfully requests that the

motion herein be granted in its entirety.

Dated: Bronx, New York
June 26, 1980

Gerald Masone
GERALD MASONE

Sworn to before me on
June 26, 1980

Daniel W. Ettinger
Notary Public

DANIEL W. ETTINGER
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31-6268718
QUALIFIED IN NEW YORK CO.
QUALIFICATIONS FILED BRONX CO.
COMMISSION EXPIRES MARCH 30, 1982

79 - 8866

RECEIVED
JUN 28 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF
THE UNITED STATES

GERALD MASONE,

APPELLANT,

- against -

PHYLIS MASONE,

RESPONDENT.

JURISDICTIONAL STATEMENT
with APPENDIX

PLEASE TAKE NOTICE that Appellant, GERALD MASONE, appeals herewith on constitutional grounds the orders, decisions and judgments of the New York Court of Appeals, entered April 3, 1980, which dismissed his appeal on the grounds that no substantive constitutional question is directly involved, from the judgment of the Appellate Division of the State of New York, First Department, entered on January 22, 1980, which affirmed without opinion the judgments of the trial term all of which is presently unreported. A copy of the Notices of Appeal, the order of the Court of Appeals, the Appellate Division Order and the decisions of the trial court are attached hereto.

The nature and object of this cause of action are alimony, support and counsel fees and the unconstitutionality of the New York State Domestic Relations Law Sections 236, 237, 240, 244 and 245 and the General Obligations Law 5-311,

(see Appendix for text), the disregard and refusal of the New York Courts to follow the mandate of the Supreme Court of the United States in ORR v. ORR, 440 U.S. _____, 59 L.Ed.2d 306, 99 S.Ct. 1102, and CHILDS v. CHILDS, ____ U.S._____, 5. F.L.A. 2412 (March 19, 1979), which are gender-based statutes which provide only for alimony to be paid by a male to a female and counsel fees to be paid by a male for a female.

The Appellant is a disabled retired firefighter and the respondent is a highly paid supervisor without dependents and this matter was decided in a trial term prior to CHILDS v. CHILDS, supra and ORR v. ORR, supra, and appellant's constitutional rights have been violated in that there has never been a hearing upon appellant's ability to pay counsel fees for appellant CHILDS v. CHILDS, supra.

Thereafter, CHILDS v. CHILDS, supra, and ORR v. ORR, supra, were mandated by the Supreme Court of the United States, and the New York State Appeals Courts disregarded and refused to follow the said mandates thereby denying the supremacy of the Supreme Court of the United States.

Subsequently, the laws have been changed but the appellant has been subjected to the old law without benefit of the new thereby denied due process and equal protection guarantees. The appellant was subjected to multitudinous judges at the trial term, a referee who was never appointed or designated who recommended substantial provisions of the

trial court's decisions which effectively denied the appellant access to a properly designated judicial court officer and court.

The orders, judgments and decisions appealed to the Court of Appeals, and the Appellate Division, First Department, were rendered in the Supreme Court of the State of New York, County of the Bronx, under Index Number 4281/1966, on November 28, 1977 and March 9, 1978 by Mr. Justice Joseph DiFede.

The original parties to the action herein are:

PHYLIS MASONE - Respondent-Plaintiff, and

GERALD MASONE - Appellant-Defendant.

The attorneys for the Appellant, GERALD MASONE, are

DANIEL K. ETTINGER, ESQ.
10 West Fordham Road
Bronx, New York 10468
212-298-8306

VICTOR L. BRIZEL, ESQ.
of counsel
79 Madison Avenue
New York, New York 10016
212-684-6088

The attorney for the Respondent, PHYLIS MASONE, is

DAVID ARENS, ESQ.
667 Madison Avenue
New York, New York 10021
212-752-8118

The Attorney General of the State of New York appeared on the statutory constitutional challenges

HON. ROBERT ABRAMS
Attorney General - State of New York
Two World Trade Center
New York, New York
212- 488-4141
by: ROBERT SCHACK, Asst. Attorney General
Room 4205

The appellant prays to the Supreme Court of the United States to hear the appeal herein or grant summary remand.

Dated: Bronx, New York
June 26, 1980

Yours, etc.,

DANIEL K. ETTINGER, ESQ.
Attorney for Appellant
10 West Fordham Road
Bronx, New York 10468
212-298-8306

TO: Clerk of the Court
Supreme Court - County of Bronx

Hon. Robert Abrams
Attorney General State of New York

David Arens, Esq.
Attorney for Respondent.

APPENDIX

§ 236. Alimony, temporary and permanent

In any action or proceeding brought (1) during the lifetime of both parties to the marriage to annul a marriage or declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, the court may direct the husband to provide suitably for the support of the wife as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of the wife to be self supporting, the circumstances of the case and of the respective parties. Such direction may require the payment of a sum or sums of money either directly to the wife or to third persons for real and personal property and services furnished to the wife, or for the rental of or mortgage amortization or interest payments, insurance, taxes, repairs or other carrying charges on premises occupied by the wife, or for both payments to the wife and to such third persons. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by the wife (1) by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, or (2) by reason of the misconduct of the wife, unless such misconduct would itself constitute grounds for separation or divorce, or (3) by reason of a failure of proof of the grounds of the wife's action or counterclaim. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the wife under this section with any amount payable to the wife under section two hundred forty of the domestic relations law. Upon the application of either the husband or the wife, upon such notice to the other party and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or by final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of the domestic relations law the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter.

Added L.1962, c. 313, § 10; amended L.1963, c. 685, § 6; L.1968, c. 699, § 1.

§ 237. Counsel fees and expenses

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against the wife who was the defendant in any action outside the State of New York and did not appear therein where the wife asserts the nullity of such foreign judgment, or (5) by a wife to enjoin the prosecution in any other jurisdiction of an action for a divorce, or (6) upon any application to annul or modify an order for counsel fees and expenses made pursuant to this subdivision provided, the court may direct the husband, or where an action for annulment is maintained after the death of the husband may direct the person or persons maintaining the action, to pay such sum or sums of money to enable the wife to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. Such direction must be made in the final judgment in such action or proceeding, or by one or more orders from time to time before final judgment, or by both such order or orders and the final judgment. Upon application of the husband or the wife or the person or persons maintaining an action for annulment after the death of the husband, upon such notice to the other party and given in such manner as the court shall direct, the court may, in or before final judgment, annul or modify any such direction. Subject to the provisions of section two hundred forty-four of the domestic relations law the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter.

(b) Upon any application to annul or modify an order or judgment for alimony or for custody, visitation, or maintenance of a child, made as in section two hundred thirty-six or section two hundred forty provided, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct the husband or father to pay such sum or sums of money for the prosecution or the defense of the application or proceeding by the wife or mother as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. With respect to any such application or proceeding, such direction may only be made in the order or judgment by which the particular application or proceeding is finally determined.

Added L.1962, c. 313, § 10. Amended L.1963, c. 311, § 1; L.1963, c. 685, § 7.

§ 240. Custody and maintenance of children

In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction may make provision for the education and maintenance of such child out of the property of either or both of its parents. Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. Such direction may require the payment of a sum or sums of money either directly to the wife or to third persons for goods or services furnished for such child, or for both payments to the wife and to such third persons. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the wife under this section with any amount payable to the wife under section two hundred thirty-six. Upon the application of either the husband, or the wife, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party or parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this chapter the authority granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter.

Added L.1962, c. 313, § 10; amended L.1963, c. 685, § 9; L.1976, c. 133, § 1.

§ 244. Enforcement by execution of judgment or order in action for divorce, separation or annulment

Where the husband in an action for divorce, separation or annulment, or declaration of nullity of a void marriage, or a person other than the husband when an action for an annulment is maintained after the death of the husband, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, the court in its discretion may make an order directing the entry of judgment for the amount of such arrears, or for such part thereof as justice requires having a regard to the circumstances of the respective parties, together with ten dollars costs and disbursements. The application for such order shall be upon such notice to the husband or other person as the court may direct. Such judgment may be enforced by execution or in any other manner provided by law for the collection of money judgments. The relief herein provided for is in addition to any and every other remedy, including, but not limited to the remedy provided pursuant to the provisions of section forty-nine-b of the personal property law, to which the wife may be entitled under the law; provided that when a judgment for such arrears or any part thereof shall have been entered pursuant to this section, such judgment shall thereafter not be subject to modification under the discretionary power granted by this section; and after the entry of such judgment the judgment creditor shall not hereafter be entitled to collect by any form of remedy any greater portion of such arrears than that represented by the judgment so entered.

Added L.1962, c. 313, § 10; amended L.1963, c. 667, § 1; L.1963, c. 685, § 12.

§ 245. Enforcement by contempt proceedings of judgment or order in action for divorce, separation or annulment

Where the husband, in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or for the enforcement in this state of a judgment for divorce, separation, annulment or declaration of nullity of a void marriage rendered in another state, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by resorting to the security, if any, given as prescribed by statute,[1] the court, in its discretion, may make an order requiring the husband to show cause before it at a time and place therein specified why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court other than a criminal contempt, and where the judgment or order directs the payment to be made in installments, or at stated intervals, failure to make such single payment or installment may be punished as therein provided, and such punishment, either by fine or commitment, shall not be a bar to a subsequent proceeding to punish him as for a contempt for his failure to pay subsequent installments, but for such purpose he may be proceeded against under the said order in the same manner and with the same effect as though such installment payment was directed to be paid by a separate and distinct order, and the provisions of the civil rights law are hereby superseded so far as they are in conflict therewith. Such order to show cause may also be made without any previous sequestration or direction to give security where the court is satisfied that they would be ineffectual. No demand of any kind upon the husband shall be necessary in order that he be proceeded against and punished for failure to make any such payment or to pay any such installment; personal service upon the husband of an uncertified copy of the judgment or order under which the default has occurred shall be sufficient.

Added L.1962, c. 313, § 10; amended L.1975, c. 497, § 1.

[1] See section 243.

§ 5-311. Certain agreements between husband and wife void

A husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife or to relieve the wife of liability to support her husband provided that she is possessed of sufficient means and he is incapable of supporting himself and is or is likely to become a public charge.

An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds for divorce.

L.1963, c. 576, § 1; amended L.1966, c. 254, § 12.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the third *day of* April *A. D. 19* 80

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

---

1 Mo. No. 386 SSD 42
Phylis Masone,
Respondent,
vs.
Gerald Masone,
Appellant.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

PHYLIS MASONE,

Respondent-Appellee,

- against -

GERALD MASONE,

Defendant-Appellant.

Index No.: 4281/1966
A.D. No.: 7188 N

NOTICE OF APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that Appellant, GERALD MASONE, herewith appeals the final order, decision and judgment of the Appellate Division of the Supreme Court, First Department, in the above-entitled action, entered on January 22, 1980, and appearing in the NEW YORK LAW JOURNAL on January 24, 1980, to the NEW YORK COURT OF APPEALS.

Dated: Bronx, New York
February 3, 1980

Respectfully,

DANIEL K. ETTINGER, ESQ.
Attoreney for Appellant
10 West Fordham Road
Bronx, New York 10468
212-298-8306

TO: Clerk, Appellate Division
First Department

Clerk, County of the Bronx

Robert Abrams, Attorney General
State of New York

David Arens, Esq.
Attorney for Appellee

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 22, 1980

Present- Hon. Francis T. Murphy, Jr., Presiding Justice
Theodore R. Kupferman
David Ross
Arthur Markewich
J. Robert Lynch, Justices

Phyllis Masone, Plaintiff-Respondent, -against- Gerald Masone, Defendant-Appellant, -and- Attorney General of the State of New York, Intervenor.	7188N

An appeal having been taken to this Court by the defendant-appellant

from the order of the Supreme Court, Bronx County

(Di Fede, J.), entered on November 25, 1977, confirming a referee's report which set the arrears of support and alimony, ordered a wage assignment and granted counsel fees,

and said appeal having been argued by Mr. Daniel K. Ettinger of counsel for the appellant, by Mr. Robert J. Schack of counsel for the intervenor,

of counsel for the appellant, and by Mr. David Arens

of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order

so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI

Clerk.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

PHYLIS MASONE,

Plaintiff,

- against

GERALD MASONE,

Defendant.

Index No.: 4281/1966

NOTICE OF APPEAL

S I R S :

PLEASE TAKE NOTICE that the above named defendant, GERALD MASONE, hereby appeals to the Appellate Division of the New York State Supreme Court in and for the First Department, from a Decision filed March 9, 1978, in addition to the already pending appeal from an Order entered November 28, 1977, and from any and all reports, decisions, orders and judgments entered in the above entitled action in favor of the above named plaintiff, PHYLIS MASONE, against the above named defendant, GERALD MASONE.

Dated: Bronx, New York
April 4, 1978

Yours, etc.,

DANIEL K. ETTINGER, Esq.
Attorney for Defendant
10 West Fordham Road
Bronx, New York 10468

TO: Clerk of the Court
Bronx County

DAVID ARENS, Esq.
Attorney for Plaintiff
75 Rockefeller Plaza
New York, New York 10019

FILED
MAR. 9 1978
BRONX COUNTY CLERK'S OFFICE

SUPREME COURT : BRONX COUNTY
SPECIAL TERM : PART I

----------X

PHYLIS MASONE,

Plaintiff,

- against -

GERALD MASONE,

Defendant.

----------X

Index No.
4281/66

DI FEDE, J.:

Motion for an order permanently staying and enjoining all executions, judgments and orders without filing appeal bond is denied.

This matter has been on appeal and as recently as February 23, 1978 both parties appeared for conference before Mr. Justice Capozzoli of the Appellate Division on the merits of the appeal. Application for a stay may be sought before the Appellate Division which now has the matter before it. It is alleged, however, that appellant has not yet perfected the papers on appeal. Much of the monies owed herein stem from arrears on a judgment which may reasonably exceed the $1,000. complained of which this Court ordered deducted from defendant's disability pension with the Fire Department of the City of New York at the rate of $100. per week allocable $75. for

current support and $25. against arrears. As the arrears are fixed, the likelihood of their complete reduction is remote at best before the appeal is perfected and determined.

The objection to the legal propriety of directing such deduction from defendant's disability pension is not well-founded. Although Section B 19-19-7.94 of the New York City Administrative Code, Article 1 B provides that the retirement allowance itself is exempt from execution, garnishment, or attachment, similar statutes have been held inapplicable to awards and judgments of alimony and child support, but not so as to counsel fees, with which conclusion I concur herein (Epstein v. Epstein, 10 Misc 2d 572, 169 N.Y.S. 2d 946).

The application to stay execution and to suspend the requirement of an appeal bond is denied without prejudice to renewal in the Appellate Division.

Dated: March , 1978.

J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

PHYLIS MASONE, Plaintiff,

- against -

GERALD MASONE, Defendant.

Notice of Appeal

Index No.: 4261/66

SIRS:

PLEASE TAKE NOTICE that the above named defendant, GERALD MASONE, hereby appeals to the Appellate Division of the New York Supreme Court in and for the First Department, from an Order dated November 22, 1977, and from any and all reports, decisions, orders and judgments entered in the above entitled action in favor of the above named plaintiff, PHYLIS MASONE, against the above named defendant, GERALD MASONE.

Dated: Bronx, New York
December 20, 1977

Yours, etc.,

DANIEL K. ETTINGER, ESQ.
Attorney for Defendant
Office and Post Office Address
10 West Fordham Road
Bronx, New York 10468

TO: Clerk of the Court
Bronx County

David Arene, Esq.
Attorney for Plaintiff

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Bronx, at the County Courthouse, 851 Grand Concourse, Borough of Bronx, City and State of New York on the 23rd day of November, 1974.

PRESENT: HON. JOSEPH DI FEDE,

Justice

----------X

PHYLIS MASONE,

Plaintiff,

-against-

GERALD MASONE,

Defendant.

----------X

ORDER

Index No. 4281/66

An order having been duly made and entered on October 1 1976 by Mr. Justice Joseph DiFede, referring defendants motion dated May 12, 1976 for an order setting forth that the defendant be relieved, mitigated and exonerated for past alimony due and owing the plaintiff and for a downward modification of alimony provisions, to Special Referee, B. William Rothberg, to inquire and report upon the defendant's financial circumstances, his ability to pay and the correct amount of arrears, and pending receipt of said report, defendant's motion is held in abeyance;

and, said Referee having inquired and having within the time prescribed by law, on May 19, 1977, duly filed in the office of the Clerk of Bronx County, his report, and a transcript of the testimony together with exhibits or copies thereof; and

Plaintiff having moved this court for an order pursuant to CPLR 4403 confirming the report, and other relief, namely, requiring defendant, Gerald Masone, pay $75.00 per week for the maintenance and support of the plaintiff, and twenty-five ($25.00) dollars per week in reduction of arrears of alimony and support; denying defendant's motion to reduce alimony and support and to relieve defendant of past alimony and support due; fixing the defendant's arrears of alimony and support in the sum of $14,385.00 up to and including March 14, 1977, and in addition thereto any arrears in alimony up to and including the return date of this motion;

directing the defendant to pay to plaintiff in reduction of said alimony and support arrears the sum of $4,000.00 within 10 days from the date of service of an order with notice of entry upon defendant's attorney;

directing, pursuant to Personal Property Law Section 49-b, the New York City Fire Department Pension Fund & Article 1B, 110

Church Street, New York City, New York to deduct the sum of $100 per week from defendant's pension and pay same directly to the plaintiff at her residence located at 72-10 112th Street, Forest Hills, New York, 11375, in payment of $75.00 per week alimony and $25.00 per week of arrears of alimony and support;

permanently enjoining the defendant from in any way or manner molesting, interfering, harassing, following, or otherwise be in the proximity of plaintiff's or her attorney's residence(s) or place of work;

counsel fees awarded to plaintiff's counsel in the sum of $500.00;

and, for such other and further relief as to this Court shall be just and proper; and, plaintiff having further moved by order to show cause for an order of sequestration upon defendant's aforesaid pension; and

Defendant, having moved for an order setting aside the report of said Referee and also moved to terminate alimony and suspend judgments and arrearages,

NOW on reading and filing the report and transcript of testimony, plaintiff's notice of motion dated June 2, 1977,

with proof of service thereof, and the affidavit of Phyllis Masone sworn to June 2, 1977 and the affirmation of David Arens, Esq., dated June 2, 1977, and the reply affirmation of David Arens dated July 2, 1977, in support of the motion, and defendant's affidavit sworn to June 29, 1977, and the affirmation dated June 29, 1977 of Daniel K. Ettinger, Esq., in opposition thereto, and defendant's notice of motion dated June 30, 1977, with proof of service thereof, and the affirmation dated June 30, 1977 of Daniel K. Ettinger, Esq., and plaintiff's affidavit of September 17, 1977, and the affirmation dated July 3, 1977 of David Arens, Esq., in opposition thereto, and defendant's notice of motion dated July 28, 1977, with proof of service thereof, and the affidavits of defendant sworn to July 28, 1977 and August 5, 1977, and the affirmation dated August 5, 1977 of David Arens, Esq., in opposition thereto, and the plaintiff's order to show cause, dated July 11, 1977, and the affidavits of the plaintiff sworn to July 11, 1977 and August 3, 1977 and the affirmations dated July 8, 1977 and August 3, 1977 of David Arens, Esq., in support thereof, and affidavit of defendant sworn to July 28, 1977 and the affirmation of Daniel K. Ettinger, Esq., dated July 28, 1977; and

It appearing that the findings of fact and conclusions of law set forth in said Referee's report accord with the preponderance of evidence adduced at the hearing held before him, it is

ORDERED that the motion to confirm the report of the Special Referee B. William Rothberg, the Referee appointed to inquire and report herein, be and the same is hereby granted, and it is further

ORDERED that the report be and the same is hereby in all things confirmed, and it is further

ORDERED AND ADJUDGED, that Susan Masone, daughter of the parties herein, was emancipated on December 1, 1976, and it is further

ORDERED AND ADJUDGED that this Court's order and judgment of July 24, 1974 by Mr. Justice Joseph A. Brust that the defendant, Gerald Masone, pay to the plaintiff, Phylis Masone, commencing May 1, 1974 the sum of $100.00 per week, each Monday per week, payable $25.00 per week for the maintenance and support of the infant daughter of the parties, Susan Masone, and $75.00 per week for the maintenance and support of the plaintiff, Phylis Masone, continues in full force and effect, except that

said Court's order and judgment of July 24, 1974 is modified only to the extent of eliminating therefore as of December 1, 1976 any and all subsequent and future maintenance and support payments for the said infant daughter, Susan Masone, by reason of her aforestated emancipation, and it is further,

ORDERED AND ADJUDGED that the aforestated provision for alimony, maintenance and support in the sum of seventy-five ($75.00) dollars per week, each Monday per week, payable by the defendant, Gerald Masone, to the plaintiff, Phylis Masone, is not modified, and that said obligation of the defendant, Gerald Masone, to pay said sum to the plaintiff, Phylis Masone, as aforesaid, continues in full force and effect; and it is further

ORDERED that the defendant's motion to be relieved, mitigated, and exonerated for past alimony due and owing plaintiff and for a downward modification of alimony provisions said motion having been previously held in abeyance, is denied in its entirety, and it is further

ORDERED that the defendant's motion to set aside and disaffirm the aforesaid Report of said Special Referee is

denied; and it is further

ORDERED that the defendant's motion for an order terminating all alimony, support and maintenance payments to the plaintiff and terminating and suspending any and all judgments and arrearages previously allowed, is denied in its entirety, and it is further

ORDERED that the plaintiff's motion for sequestration of the defendant's pension fund is denied without prejudice to renewal if it should appear that the wage attachment order granted simultaneously herewith is inadequate; and it is further

ORDERED AND ADJUDGED, that the defendant, Gerald Masone, is in arrears and does owe to the plaintiff, Phylis Masone, for the support and maintenance and alimony of the plaintiff and the issue of the marriage of the parties hereto in the sum of Fourteen Thousand Three Hundred Eighty-Five ($14,385.00) Dollars which is owed to the plaintiff for the period up and including March 14, 1977; and, it is further

ORDERED AND ADJUDGED, that the said arrears of Fourteen Thousand Three Hundred Eighty-Five ($14,385.00) Dollars shall be payable by the defendant to the plaintiff in the sum of $3,000.00 due within 30 days after service upon Daniel K.

Ettinger, attorney for defendant, of a copy of this order with notice of entry and the balance payable at the rate of Twenty-Five ($25.00) Dollars per week until the said arrears have been paid in full, and it is further

ORDERED, that the defendant, Gerald Masone, pay to the plaintiff, Phylis Masone, any sums due thereunder by mailing same to her residence, 72-10 112th Street, Queens, New York, 11375, or to any place plaintiff designates in writing with her signature, acknowledged by a notary public, and it is further

ORDERED, that pursuant to Section 49-b of the Personal Property Law, the New York City Fire Department Pension Fund - Article 1B, 110 Church Street, New York, New York be and is hereby directed to withhold and deduct from any pension payments to be paid to Gerald Masone, defendant, former New York City Fire Department Lieutenant, who presently resides at 1463 Waring Avenue, Bronx, New York, One Hundred ($100.00) Dollars each and every week commencing forthwith and to forward the total amount so withheld on the fifteenth day of each month to the plaintiff, Phylis Masone, at her residence at 72-10 112th Street, Queens, New York, 11375; and for each

One Hundred ($100.00) Dollars so paid the sum of Twenty Five ($25.00) Dollars shall be applied toward reducing the above stated arrears; and, it is further

ORDERED AND ADJUDGED, that the defendant, Gerald Masone, be and he hereby is directed to pay to the plaintiff, Phylis Masone, by mailing to her abovestated residence, the sum of Five Hundred ($500.00) Dollars, in payment of plaintiff's counsel fees and disbursements in this proceeding within thirty (30) days after service upon Daniel K. Ettinger, attorney for defendant of a copy of this order with notice of entry and it is further

ORDERED that in accordance with Section 49-b of the Personal Property Law this Order shall take priority over any other assignments or garnishment of said pension except those deductions made mandatory by law; and it is further

ORDERED, that personal service upon, or the mailing of a certified copy of this Order to the said pension fund at the above stated address shall be deemd good and sufficient service; and it is further

ORDERED, that the defendant, Gerald Masone, be and here is enjoined and restrained from in any way or manner molesting, harassing, threatening, or following the plaintiff, Phylis Mason

or her counsel, David Arens, or his family and is further enjoined and restrained from being in the proximity or near the plaintiff's or said counsel's residences or places of work; and by reason of this order of protection, and presentation thereof to any peace officer shall constitute authority for him to take into custody the defendant charged with violating the terms of this provision of this order of protection and bring such person before the Court and, otherwise, so far as lies within his power, to aid in securing the protection such order was intended to afford.

E N T E R

/s/ Joseph DiFede

JOSEPH DI FEDE
Justice of the Supreme Court

SUPREME COURT : BRONX COUNTY
SPECIAL TERM : PART 1

- X

PHYLIS MASONE,

Plaintiff,

-against-

GERALD MASONE,

Defendant.

- X

FILED

NOV 9 1977

BRONX COUNTY CLERK'S OFFICE

INDEX NO. 4281/66

DiFEDE, J.:

Motions to confirm the referee's report, to reject the report, to terminate all alimony and support, and for sequestration of defendant's pension are consolidated for disposition.

Motion to confirm the report of the Special Referee is granted and the motion to disaffirm is denied.

Pursuant thereto, defendant's motion to be relieved of all alimony previously held in abeyance is denied in its entirety.

The arrears of alimony and support are fixed in the sum of $14,385. Within 30 days after service of a copy of the order to be settled herein, defendant shall pay to the plaintiff the sum of $3,000. as a reduction of said arrears.

Plaintiff is granted a wage attachment pursuant to Personal Property Law 49-b. In accordance therewith, defendant's pension fund is directed to withhold and pay to the plaintiff th

sum of $100. per week, out of which the sum of $25. shall be applied toward reducing the arrearage.

Motion by defendant to relieve himself of all arrearages and to vacate the award of alimony and support is denied.

Motion by plaintiff for sequestration of the defendant's pension fund is denied without prejudice to renewal if it should appear that the wage attachment order granted simultaneously herewith is inadequate.

Plaintiff is awarded a counsel fee in the amount of $500 for the purpose of defending and prosecuting the various motions described herein. Said sum is payable within 30 days after service of the order to be settled herein with date of entry.

Finally, an order of protection is granted which shall inure to the benefit of both plaintiff and her counsel.

Settle order.

DATED: November 4, 1977.

Joseph D. Lane
J. S. C.

RECEIVED
JUN 28 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

COUNTY CLERK
BRONX COUNTY
80 JUN 27 PM 2:41

RECEIVED

79 - 6866

SUPREME COURT
of the UNITED STATES

GERALD MASONE,

Appellant,

- against -

PHYLIS MASONE,

Respondent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PLEASE TAKE NOTICE that the Appellant, GERALD MASONE, appeals the decision and order of the NEW YORK STATE COURT OF APPEALS, dated the 3rd day of April, 1980, to the SUPREME COURT OF THE UNITED STATES, wherein the Appellant challenged the constitutionality of the New York State statutes , Domestic Relations Law 236, 237, 240, 244 and 245 and General Obligations Law 5-311 and their relationship to alimony, support and counsel fees which violates the equal protection provisions of the United States Constitution, the failure of the New York courts to follow the recent Supreme Court of the United States decisions in ORR v. ORR, 440 US _____, 59 L.ED2d 306, 99 Sup Ct 1102 and CHILDS v. CHILDS, _____U.S._____; 5 F.L.A. 2412 (March 19, 1979), the multitudinous number of judges who presided at the trial term, an undesignated or unauthorized referee who heard the testimony at the trial term, and denial thereby of due process of law

pursuant to the 14th Amendment of the Constitution of the United States of America.

Dated: Bronx, New York
June 26, 1980

Respectfully,

DANIEL K. ETTINGER, ESQ.
Attorney for Appellant
10 West Fordham Road
Bronx, New York 10468
212-298-8306

TO: County Clerk
Supreme Court - Bronx County

Robert Abrams, Attorney General
State of New York

David Arens, Esq.
Attorney for Respondent

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 11, 1978.

Present--Hon. Harold Birns, Justice Presiding
Herbert B. Evans
Arnold L. Fein
Arthur Markewich
Joseph P. Sullivan, Justices.

Phylis Masone,

Plaintiff-Respondent,

-against-

Gerald Masone,

Defendant-Appellant.

M-1327

The above named defendant-appellant having moved for leave to prosecute as a poor person his appeals from the orders of the Supreme Court, Bronx County, entered on November 22, 1977, and March 9, 1978, and for leave to have the appeal heard on the original record and upon reproduced appellant's points; and for other relief,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavits of Gerald Masone in support of said motion, and the affidavit of Phylis Masone and the statement of David Arens in opposition thereto, and after hearing Mr. Daniel K. Ettinger for the motion, and Mr. David Arens opposed,

It is ordered that said motion be and the same hereby is granted only insofar as (1) to permit the appeals to be heard on the original record, and upon reproduced appellant's points, on condition that the appellant serves one copy of the reproduced appellant's points upon the attorney for respondent, and files twelve reproduced copies of appellant points, together with the original record, with this Court. and (2) to dispense with any fee for transferring the record from the Supreme Court to this Court, and the motion, insofar as it seeks a free transcript, is denied.

ENTER: JOSEPH J. LUCCHI

Clerk.

SUPREME COURT OF
THE UNITED STATES

GERALD MASONE,

Appellant,

- against -

PHYLIS MASONE,

Respondent.

SUPPORTING ATTORNEY'S AFFIDAVIT TO APPELLANT'S MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF THE BRONX) ss.:

DANIEL K. ETTINGER, being duly sworn, deposes and says that:

I am an attorney and counsellor of law duly admitted to practice before this Court.

I have known the appellant for over five years and know him to be a disabled retired fireman.

I know that he is unemployed and has been unemployable since his retirement.

Previously, the New York Appeal Courts granted him poor person's relief and it is my conclusion that his circumstances have deteriorated since that time.

I am familiar with the papers submitted on his behalf and believe him to be entitled to forma pauperis relief.

WHEREFORE, your deponent respectfully requests that the motion herein be granted in its entirety.

Dated: Bronx, New York
June 26, 1980

DANIEL K. ETTINGER

Sworn to before me on
June 26, 1980

Notary Public

MARY B. CONLAN
Notary Public, State of New York
No. 31-4634706
Qualified in New York County
Term Expires March 30, 19[illegible]

Cm 2

RECEIVED
JUL 28 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-6866

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

GERALD MASONE,

Appellant,

-against-

PHYLIS MASONE,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS ~~THE APPEAL AND TO DENY CERTIORARI~~ OR, ~~IN THE ALTERNATIVE, TO~~ AFFIRM

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney Pro Se,
Intervenor-Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7590

SHIRLEY ADELSON SIEGEL
Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
of Counsel

10/

Questions Presented

Whether review should be denied because the federal question posed herein does not appear on this record to have been raised properly and decided in State Court?

Assuming arguendo that the merits were decided by the Appellate Division, whether the writ of error herein is improperly taken from the Court of Appeals, which under New York law at most determined whether the issues were substantial enough for review and not whether they were correctly decided?

Whether review should be denied since no substantial federal question is presented?

Assuming arguendo that probable jurisdiction is found, whether the order below should be affirmed since appellant's objections are meritless?

Table of Contents

Page

Statement of the Case.....1

Statutes Involved.....4

POINT I - THE APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED BECAUSE THE FEDERAL QUESTION POSED HEREIN DOES NOT APPEAR ON THIS RECORD TO HAVE BEEN RAISED PROPERLY AND DECIDED ON THE MERITS IN STATE COURT. ASSUMING ARGUENDO THAT THE MERITS WERE DECIDED BY APPELLATE DIVISION, THE WRIT OF ERROR HEREIN WOULD RUN TO THAT COURT AND NOT TO THE COURT OF APPEALS, WHICH UNDER NEW YORK LAW AT MOST DETERMINED ONLY WHETHER THE ISSUES WERE SUBSTANTIAL ENOUGH FOR REVIEW AND NOT WHETHER THEY WERE CORRECTLY DECIDED.....4

POINT II - THE APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED SINCE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.....7

POINT III - ASSUMING ARGUENDO THAT PROBABLE JURISDICTION IS NOTED HEREIN, THE COURT SHOULD AFFIRM.....11

Conclusion.....12

Appendix

Table of Cases

Page

Cardinale v. Louisiana,
394 U.S. 437 (1969).....6,9

Childs v. Appellate Division,
____ U.S. _____, 100 S. Ct. 691(1980).....2,8

Childs v. Childs,
440 U.S. 952, decision on remand, 69 A D 2d
406 (2d Dept), app. dsmd. 48 N Y 2d 754 (1979),
app. dsmd, cert. den. _____ U.S. ____, 100 S.Ct.
1824 (1980).....passim

Columbia Water Power Co. v. Columbia Elec. St.
R.R. Light & Power Co.,
172 U.S. 475 (1899).....6

Crowell v. Randell,
10 Pet. [35 U.S.] 368 (1836).....6

DiBella v. DiBella,
47 N Y 2d 828 (1979).....5

Emmer v. Emmer,
69 A D 2d 850 (2d Dept. 1979).....5,9

Fisher v. Perkins,
122 U.S. 522 (1887).....7

Matter of Goldberg v. Aylward,
72 A D 2d 510 (1st Dept. 1979).....6

Graver v. Tank & Mfg. Co.,
336 U.S. 271 (1949).....9

Jongebloed v. Erie R.R. Co.,
271 App. Div 815 (1st Dept. 1946), lv. app. den.
296 N Y 912, aff'd (app. as of right)
297 N Y 534 (1947),
cert. den. 333 U.S. 855 (1948).....6

Karp v. Karp,
70 A D 2d 813 (1st Dept. 1979).....5,9

Matter of Marchant v. Mead-Morrison Mfg. Co.,
252 N Y 284 (1929), app. dsmd. 282 U.S.
808 (1930).....7

Matthews v. Huwe,
261 U.S. 262 (1925).....7

New Orleans Waterworks Co. v. Louisiana,
185 U.S. 336 (1902).....11

Norfolk & Suburban Turnpike Co. v. Virginia,
225 U.S. 264 (1912).....7

Orr v. Orr,
440 U.S. 268 (1979), decision on remand,
374 So. 2d 895 (Civ. App.), writ den. 374 So. 2d
898 (Ala.1979), app. dsmd., cert. den. ____ U.S. ___,
100 S. Ct. 993 (1980).....passim

Stanton v. Stanton (I),
421 U.S. 7 (1975).....8

Stanton v. Stanton (II),
429 U.S. 501 (1977).....8

Table of Statutes

A. Federal

United States Constitution,
Amendment XIV.....2,4,8

28 U.S.C. § 1257.....4-5

B. New York

Civil Practice Law & Rules,
Rule 2217(a).....4,10

§ 5514(a).....4,7

§ 5601(b)(1).....4-5

§ 5602(a)(1)(i).....4,7

Domestic Relations Law, § 236.....3-4

§ 237.....2-4,9

§ 240.....3-4

§ 244.....2-4

§ 245.....3-4

Family Court Act, § 438.....4-5

General Obligations Law, § 5-311.....3-4

Chapter 281, Laws of 1980.....9

Table of Other Authorities

Cohen & Karger, Powers of the
New York Court of Appeals.....7

No. 79-6866

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

GERALD MASONE,

Appellant,

-against-

PHYLIS MASONE,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS THE APPEAL AND TO DENY
CERTIORARI OR, IN THE ALTERNATIVE, TO AFFIRM

Statement of the Case

The Attorney General of the State of New York, Intervenor-Appellee herein, moves to dismiss the appeal and to deny certiorari or, in the alternative, to affirm the April 3, 1980, order of the New York Court of Appeals, on the grounds that the questions posed herein were not raised properly and decided on the merits in State court, that if any court reached the merits, it was the intermediate appellate court and this appeal is wrongly taken from the Court of Appeals' order, that the federal questions raised are not substantial, and that, in any event, the appeal was correctly decided on the merits.

This Court on March 5, 1979, in Orr v. Orr, 440 U.S. 268 (1979), held Alabama's alimony statutes invalid under the Equal Protection Clause for permitting awards only to wives after a financial fact-finding directed toward both spouses. Two weeks later, this Court remanded Childs v. Childs, 440 U.S. 952 (1979), to the Second Department of the Appellate Division of the Supreme Court of the State of New York "for further consideration in light of Orr v. Orr", supra. Childs involved an equal protection challenge to New York's Domestic Relations Law (DRL) § 237(b)* which, literally read, authorizes counsel fee awards only to wives after a financial fact-finding directed to both husbands and wives.

On July 11, 1979, the Appellate Division, Second Department, rendered a decision in Childs on such remand, consolidated with other State appeals from orders entered therein, reported at 69 A D 2d 406. It upheld the constitutionality of DRL §§ 237(b) and 244* by reading them in tandem with other State statutes and in accordance with legislative intent to permit the award of counsel fees in matrimonial actions to husbands as well as to wives. The Appellate Division order remitted the proceeding to trial court for a hearing at which appellant could apply for counsel fees. Mr. Childs unsuccessfully sought further review by motion for leave to file a petition for mandamus, Childs v. Appellate Division, ____ U.S. ____, 100 S. Ct. 691 (1980), and by appeal, Childs v. Childs, app. dsmd., 48 N Y 2d 754 (1979), app. dsmd., cert. den. ____ U.S. _____, 100 S. Ct. 1824 (1980).

*The statutes are set forth in the Appendix to Appellant's Jurisdictional Statement.

Appellant herein seeks to challenge the constitutionality of DRL §§ 236, 237, 240, 244, 245, and General Obligations Law (GOL) § 5-311.* He had not raised any such challenge in trial court prior to the November 25, 1977, entry of its child support and alimony order, confirming a referee's report on arrears, ordering a wage assignment and granting counsel fees. Appellant first raised this challenge in the Appellate Division, First Department, by notice to the Attorney General dated October 5, 1979, long after this Court's decision in Orr and the Appellate Division, Second Department, decision in Childs. In the instant case, the Appellate Division, First Department, affirmed without opinion on January 22, 1980. 73 A D 2d 1067. Appellant then appealed as of right to the New York Court of Appeals which "dismissed..., sua sponte, upon the ground that no substantial constitutional question is directly involved" on April 3, 1980. 49 N Y 2d 916.**

On June 28, 1980, this Court docketed appellant's Jurisdictional Statement (hereinafter "J.S.").

*The statutes are set forth in the Appendix to Appellant's Jurisdictional Statement.

**The Court's order is set forth in full in Appendix to Appellant's Jurisdictional Statement. The order as published omits the grounds of decision.

Statutes Involved

The following statutes are set forth in the Appendix to Appellant's Jurisdictional Statement:

DRL §§ 236, 237, 240, 244, 245;

GOL § 5-311.

The following constitutional provisions and statutes are set out in the Appendix hereto:

United States Constitution, Amendment XIV, § 1;

28 U.S.C. § 1257;

New York Civil Practice Law and Rules (CPLR) Rule 2217(a), § 5514(a), § 5601(b)(1), § 5602(a)(1)(i);

New York Family Court Act (FCA) § 438.

POINT I

THE APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED BECAUSE THE FEDERAL QUESTION POSED HEREIN DOES NOT APPEAR ON THIS RECORD TO HAVE BEEN RAISED PROPERLY AND DECIDED ON THE MERITS IN STATE COURT. ASSUMING ARGUENDO THAT THE MERITS WERE DECIDED BY THE APPELLATE DIVISION, THE WRIT OF ERROR HEREIN WOULD RUN TO THAT COURT AND NOT TO THE COURT OF APPEALS, WHICH UNDER NEW YORK LAW AT MOST DETERMINED ONLY WHETHER THE ISSUES WERE SUBSTANTIAL ENOUGH FOR REVIEW AND NOT WHETHER THEY WERE CORRECTLY DECIDED.

The only Federal question posed herein is appellant's claim that the Courts below violated this Court's mandate by not holding unconstitutional several New York support laws. The

other claims were either not raised below or are not federal questions. See pp. 8-10 infra.

As to appellant's challenge to State statutes, under 28 U.S.C. § 1257* this Court may only entertain appeals or grant certiorari from "Final judgments or decrees rendered by the highest court of a state in which a decision could be had..." The appeal herein is from an order of New York's highest court, but that order held that "no substantial constitutional question is directly involved" within the meaning of the State jurisdictional statute, CPLR § 5601(b)(1), and appeal as of right therefore did not lie. The Attorney General submits that review of that order does not lie because the constitutional issue was never directly involved in this action so as to be reviewed on the merits below or in this Court, pp. 5-6 infra, and because if the Court of Appeals dismissed for lack of substantiality, its order was not a ruling on the merits and this appeal should instead have been from the Appellate Division's order, p. 7 infra.

New York appellate courts will ordinarily refuse to consider constitutional arguments that were not directly involved in the order under review and are being raised for the first time on appeal. See DiBella v. DiBella, 47 N Y 2d 828, 829 (1979); Karp v. Karp, 70 A D 2d 813 (1st Dept. 1979); Emmer v. Emmer, 69 A D 2d 850, 851 (2nd Dept. 1979). If the Appellate Division, First Department, had ruled on the constitutional issue herein, it surely would have said so since it was a matter of first impression in New York as to most of the statutes. When the same court upheld

*The statute is set forth in the Appendix hereto.

FCA § 438*, counsel fees in support proceedings, under an Orr challenge by reading it as gender-neutral, it did so in a written opinion, Matter of Goldberg v. Aylward, 72 A D 2d 510 (1st Dept. 1979). It thus appears that the State courts below did not pass on the challenge to the statutes.

It is not claimed that appellant was deprived of a "fair opportunity", Orr v. Orr, supra, 440 U.S. at 275 n.4, to raise his constitutional challenge in trial court. As a result, although he did raise the challenge on appeal, it had not become "necessarily involved", Columbia Water Power Co. v. Columbia Elec. St. R.R. Light & Power Co., 172 U.S. 475, 488 (1899), in the action so as to require appellate review.** This Court has "no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' [Crowell v. Randell,] 10 Pet. [35 U.S.] 368, 391 [1836]." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (emphasis added). Since the merits of the constitutional issue were not properly raised in State court and do not appear on the record to have been decided below - indeed, the record suggests they were not passed on -, nor were they tacitly but necessarily involved, this Court lacks jurisdiction.

*The statute is set forth in the Appendix hereto.

**If the constitutional issue was necessarily involved in the Appellate Division's decision although not raised in trial court, an appeal as of right lay to the Court of Appeals. In Jongebloed v. Erie R.R. Co., 271 App. Div. 815 (1st Dept. 1946), aff'd 297 N Y 534 (1947), cert. den. 333 U.S. 855 (1948), plaintiff had pleaded several New Jersey statutes. The trial court directed a verdict for defendant by taking judicial notice of the foreign statutes and ruling on them as a matter of law. On appeal, plaintiff for the first time argued that foreign law was a factual issue which could not be removed from the jury without depriving him of his constitutional guarantee of trial by jury. The Court of Appeals held that the Appellate Division's affirmance "necessarily involved" the constitutional issue and entitled him to appeal as of right, 296 N Y 912 (1947), apparently because the appellate court could not have decided whether the trial court properly applied the law without also deciding whether the trial court properly and constitutionally chose the law to be applied. As will be shown, p. 9 infra, the Appellate Division did not have to pass on the constitutional issue herein in order to approve the trial court's order.

Assuming arguendo that the constitutional issue was sufficiently involved to be reviewed (and rejected) on the merits by the Appellate Division, then the Court of Appeals presumably dismissed for lack of substantiality. This may be

> "one of those not infrequent cases in which decision of the merits of the case also determines jurisdiction". Matthews v. Huwe, 261 U.S. 262, 265 (1925).

Dismissal for lack of substantiality is based on summary review and has no greater precedential weight in New York than a denial of certiorari by this Court; it "has not the force of an affirmance after jurisdiction has been taken", Matter of Marchant v. Mead-Morrison Mfg. Co., 252 N Y 284, 298 (1929) (Cardozo, J.), app. dsmd. 282 U.S. 808 (1930).* It is far from the "affirmance in express terms", Norfolk & Surburban Turnpike Co. v. Virginia, 225 U.S. 264, 269 (1912), required for review by this Court. Assuming that the constitutional issue was properly raised and preserved for this Court's review, the writ of error would run to the last State court to pass squarely on that issue, the Appellate Division. Ibid. It is noteworthy that each of the appeals to this Court in Orr and Childs was taken from the intermediate appellate court's order and not from the order denying review thereof by the State's highest court. The appeal herein must be dismissed since it is taken from the Court of Appeals' order.

POINT II

THE APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED SINCE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Four possible claims are discernible in Appellant's Jurisdictional Statement. None presents a substantial federal question for review in this Court.

*Although made in the context of denial of a discretionary non-constitutional appeal, Mr. Justice Cardozo's statement is applicable herein since the scope of review and substantiality requirements for constitutional questions are the same on discretionary and mandatory appeals. Cohen & Karger, Powers of the New York Court of Appeals, § 55(c) at 252-3. To the extent that the availability under CPLR §§ 5514(a), 5602(a)(1)(i), of a discretionary appeal after dismissal of a mandatory one allows appellant a second chance to convince the Court of Appeals that his constitutional challenge is substantial, appellant has not exhausted his State appellate remedies. This Court "[is] not to assume that an appeal would not have been granted if applied for. The record must show its refusal." Fisher v. Perkins, 122 U.S. 522, 527 (1887).

Appellant's first claim is that the refusal of the courts below to hold several gender-based New York matrimonial statutes unconstitutional violates the mandate of this Court in Orr and Childs (J.S. 1-2). But the order of remand in Childs v. Childs, supra, 440 U.S. at 952, merely required the Appellate Division, Second Department, to give "further consideration [to the proceeding] in light of Orr v. Orr," supra. The Orr Court had suggested that State courts could save the constitutionality of support statutes by reading them in a gender-neutral manner.* The Courts below may have reviewed his constitutional claim and rejected it because the statutes could be read in a gender-neutral manner, as Orr itself suggested, see n."*" infra.

The Orr Court also clearly indicated, 440 U.S. at 275 & n. 4-5, that its decision could be limited to prospective effect. The Courts below thus may have refused to accept appellant's constitutional claim as untimely. See p. 5 supra. If so, that was within the Orr Court's contemplation and beyond this Court's jurisdiction now to review, 440 U.S. at 274.

Appellant's second claim is that since Orr and Childs, "the laws have been changed but the appellant has been subjected to the old law without benefit of the new [and] thereby denied due process and equal protection guarantees". (J.S. 2). It does

*The Orr Court noted, 440 U.S. at 272, that State alimony laws could be amended to be gender-neutral by legislative action, but it also suggested judicial reinterpretation of the laws by citing Stanton v. Stanton (I), 421 U.S. 7 (1975). On its second hearing of the Stanton case, this Court specifically read its first decision to require a State's highest court to apply its statute in a gender-neutral manner by reading it in light of the common law or recent legislative intent. Stanton v. Stanton (II), 429 U.S. 501, 504 n. 4 (1977).

This Court, moreover, has refused to review the State court decisions on remand, holding the statutes constitutional by reading them as gender-neutral, despite claims the decisions violate the Orr Court's mandate. Orr v. Orr, 374 So. 2d 895 (Civ. App.), writ den. 374 So. 2d 898 (Ala.1979), app. dsmd., cert. den. ___ U.S. ___, 100 S.Ct. 993 (1980); Childs v. Childs, supra; Childs v. Appellate Division, supra.

not appear from the record that appellant raised this claim below. The order appealed from was entered before the legislation rendering gender-neutral the statutes challenged herein, Chapter 281 of the Laws of 1980, passed the Legislature and was sent to the Governor. If the change of law referred to is the decision in Childs v. Childs, supra, 69 A D 2d at 420, to allow the husband a hearing de novo in trial court on counsel fees, appellant never cited that decision nor asked for a hearing de novo in the State Courts below. Under Cardinale v. Louisiana, supra, the change of law issue cannot be reviewed here since it has not been shown that it was raised or passed on in State Court.

Even assuming that appellant's second claim was reviewed below, the Appellate Division's affirmance of the trial court's order shows that it reviewed that court's findings of fact as to the relative financial circumstances and needs of the parties. The same findings would form the basis of decision whether DRL § 237 is read to authorize awards only to wives, as it literally read and was applied at the time of the trial court's decision, or if it is read in a gender-neutral manner, as under Childs. The Appellate Division thus could determine from the record before it that the award herein appealed was proper under DRL § 237, literally read or judicially interpreted, and affirm. See Karp v. Karp, supra; Emmer v. Emmer, supra. Appellant has not made the "very obvious and exceptional showing of error" needed before this Court will "undertake to review concurrent findings of fact by two courts below..." Graver v. Tank & Mfg. Co., 336 U.S. 271, 275 (1949).

Appellant fails even to designate which of his constitutional rights were violated in his last two claims. As to his

objection to "multitudinous judges at the trial term" (J.S. 2), when appellant raised the same argument below, the appellee wife pointed out that appellant had failed to appeal from several of the orders to which he was now referring and that he had never objected to having the various motions in this matter heard by different judges, although under CPLR 2217(a) he could have requested they be heard by the original trial judge. Brief for Defendant-Respondent, Point Three at 43-44, Masone v. Masone (1st Dept.). Appellant's Reply Brief did not controvert these factual assertions or argue why his failure to make timely objection should be excused. The parties' briefs show, moreover, that the motion whose decision is appealed herein was heard by a single judge (with a referee assisting), and by no other, which is all appellant was statutorily entitled to receive.

Finally, appellant asserts that one of the referees who heard the matter had not been duly appointed. (J.S.2). When he raised this claim below, Brief for Appellant, Point III at 21, his wife argued that the referee was properly appointed but did not dispute that the objection would be fatal to jurisdiction if proven, Brief for Defendant-Respondent, supra, Point Four at 45. Appellant's Reply Brief at 4 refuted his own claim by showing that the trial justice who ruled that the referee was duly appointed was the appointing authority and in a position to know what he had done. The concurrent findings of fact on this issue of the trial court and the Appellate Division are thus not clearly wrong.

In sum, appellant's first claim is not substantial because the Courts below in no way violated this Court's mandate in Orr

and Childs. His other three claims are basically "mere error in deciding questions" of the application of State law to facts and thus do not present a Federal question for this Court's review. New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 352 (1902).

POINT III

ASSUMING ARGUENDO THAT PROBABLE JURISDICTION IS NOTED HEREIN, THE COURT SHOULD AFFIRM.

Assuming arguendo that probable jurisdiction is found by this Court, the Court should affirm. Appellant's objections to the order below are meritless.

It is unrefuted that appellant failed to object to the referral of motions to new judges or to ask himself that they be referred to a single judge. It further appears from appellant's papers that the sole motion appealed was heard in its entirety by one judge. See pp. 9-10 supra. The concurrent findings of two courts below, including the appointing court, establish that the referee objected to was properly appointed. See p. 10 supra. Under Orr the Courts below could properly have refused to review his untimely constitutional challenge to the statutes, while if they did review the claim, they could read the statutes as gender-neutral. See p. 8 supra. Having done so, the Courts below could reasonably find that under the financial circumstances of the private parties, as established by two courts' concurrent fact findings, the same award would have been made under the statutes however read. See p. 9 supra. Appellant's belated change of law issue was not raised below and is unreviewable now. See pp. 8-9 supra.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED AND CERTIORARI DENIED. IN THE ALTERNATIVE, THE ORDER BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
July 25, 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney Pro Se,
Intervenor-Appellee

SHIRLEY ADELSON SIEGEL
Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
of Counsel

Appendix

United States Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals.

Civil Practice Law and Rules, Rule 2217

(a) Prior Motion. Any motion may be referred to a judge who decided a prior motion in the action.

* * *

Civil Practice Laws and Rules, § 5514.

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in Section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

* * *

Civil Practice Law and Rules, § 5601.

* * *

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the State or of the United States;...

* * *

Civil Practice Law and Rules, § 5602.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action orginating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right....

* * *

Family Court Act, § 438.

In any proceeding under this article by a wife or former wife, against her husband, or former husband, including proceedings for herself and her children, or by a person on behalf of children only, or at any hearing to modify or enforce an order entered in that proceeding or a proceeding by a husband or former husband to modify a decree of divorce, separation, or annulment, including an appeal under article ten the court may allow counsel fees at any stage of the proceeding, to the attorney representing the wife, former wife or person on behalf of children.

DISTRIBUTED
AUG 8 1980

RECEIVED
AUG 8 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-6866

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ORIGINAL COPY

GERALD MASONE,

Appellant,

- against -

PHYLIS MASONE,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S ANSWER IN OPPOSITION TO MOTION TO DISMISS THE APPEAL AND TO DENY CERTIORARI OR, IN THE ALTERNATIVE, TO AFFIRM

DANIEL K. ETTINGER, ESQ.
Attorney for Appellant
Office & P.O. Address
10 West Fordham Road
Bronx, New York 10468
212-298-8306
VICTOR L. BRIZEL, ESQ.
of Counsel

SHIRLEY ADELSON SIEGEL
Solicitor General

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney Pro Se
Intervenor-Appellee

ROBERT J. SCHACK, Assistant
Attorney General, of Counsel

DAVID ARENS
Attorney for Appellee

ROBERT KIERNAN
Attorney for Appellee
of Counsel

Table of Contents

	Pages
Appellant's Answer	1 - 8
Conclusion.	9

No. 79-6866

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

GERALD MASONE,

Appellant,

- against -

PHYLIS MASONE,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANT'S ANSWER IN OPPOSITION TO
MOTION TO DISMISS THE APPEAL AND TO
DENY CERTIORARI, OR IN THE ALTERNATIVE,
TO AFFIRM

Statement of the Case

The Attorney General of New York has the discretion whether of not to appear when constitutional issues are raised as to the validity of New York statutes in cases before the New York and Federal Courts. When the Attorney General appeared, he submitted and argued in the case herein before the Appellate Division, First Department. The Attorney General also submitted in the New York Court of Appeals when Appellant appealed as a matter of right. (See Attorney General's Brief,

p. 2, citing CPLR #5601(b)).

The Appellate Division, First Department, which has the authority to review facts and law, affirmed without opinion after the Attorney General's submission and hearing the Attorney General's oral argument. The Attorney General refers to ORR v. ORR, 440 U.S. 268 (see page IV of Attorney General's motion) and CHILDS v. CHILDS, 440 U.S. 952 (see page iii of the Attorney General's motion). He mentions this Court's remand to the Appellate Division, Second Department, which considered only a portion of the statutes challenged herein and decided by the Court therein to read such as gender neutral. The Appellate Division, Second Department, remitted the proceedings for a hearing (see Attorney General's Brief, p. 2). The New York Court of Appeals denied constitutional review, app. dsmd., CHILDS v. CHILDS and CHILDS v. APPELLATE DIVISION, 48 NY 2d 754 (1979), app. dsmd., cert. den. ___U.S. ____, 100 S.Ct. 1824 (1980).

All of the above citations refer to an appeal from the Appellate Division, Second Department, which was never reviewed by the New York Court of Appeals and having no binding legal effect on the matter herein which originated from the Appellate Division, First Department. The United States Supreme Court decisions in ORR, supra, and CHILDS, supra, are not followed in the Masone matter. The affirmance by the

Appellate Division, First Department, without remand is an affirmance and determination of the law and the facts violating this Court's mandates. An examination of the record will show constitutional issues were raised and considered in the New York Courts.

The Attorney General's technical claim that this appeal is from the Court of Appeals rather than from the Appellate Division, is an obvious attempt to prevent appellant from enforcing constitutional rights and law as interpreted by this Court. The New York Court of Appeals asked for a second submission on this case before it decided there was no substantive constitutional questions which is a decision similar to its refusal to hear CHILDS, supra, which this Court reversed. This case was appealed as a matter of right to the New York Court of Appeals, where the constitutional issues as raised in the Appellate Division were considered. The Court of Appeals' dismissal is as stated in 28 U.S.C. # 1257 (see Attorney General's Brief, p. A1) is a final judgment or decree rendered by the highest court of the State of New York in which a decision may be had. Even if it were not, appellant's mere labeling of the appeal as being from the Court of Appeals rather than from the Appellate Division should not bar consideration by this Court. There is no substantive difference other than labeling where the appeal comes from and if the Court decides to label the appeal as from the New York Court of

Appeals, then this Court can amend nunc pro tunc. Labeling the Court of Appeals is sought to protect the constitutional right of the appellant to have the dictates of prior United States Supreme Court decisions ORR and CHILDS, et al., supra, applied by New York Courts to this case.

The constitutional questions pursuant to the briefs below and the power of the Appellate Division, to determine law and facts were definitely raised. The Attorney General's papers at least should call for a remand to force the New York Courts below to write an opinion as to the constitutionality of the statutes contested though the length of time since prior United State Supreme Court decisions on matters herein might better call for summary reversal to end the refusal or reluctance of the New York Courts to follow this Court's dictates.

The dismissal by the New York Court of Appeals which appellant appealed to as a matter of right is in effect a decision that the constitutional decisions of this Court are not binding. The Attorney General's brief, p. 7, indicates that is summary review herein. The notice of appeal and jurisdictional statement indicates that the appeal is from both the Court of Appeals and the Appellate Division.

This appeal concerns the constitutionality of New York Statutes and Court decisions as stated in the jurisdictional statement, reviewed in the light of decisions interpreting United States Supreme Court decisions.

The Courts of Bronx and New York County are governed by the Appellate Division, First Department, and the Court of Appeals. The CHILDS case, supra, remand and gender neutral reading, cited by the Attorney General, (Attorney General's Brief, p. 8) is not the law in the Appellate Division, First Department. There was no remand or decision by the Appellate Division, First Department.

The Appellee an employed Department of Social Services supervisor is still collecting from the appellant, a disabled fireman, who was also ordered to pay her counsel fees. The Domestic Relations Law provisions and even Family Court Act #438 (as per the Attorney General's Brief, page A3) only imposes counsel fee obligations on the husband. When counsel fees were fixed throughout this case, only the husband had the legal obligations according to New York Law. The Appellate Division, First Department, did not consider CHILDS, supra, and ORR, supra, to require remand and reconsideration of the decisions at the trial level as did the Appellate Division, Second Department, in CHILDS, supra, because of the mandate of the United States Supreme Court, because the Appellate Division, First Department, was not required to do so. The appellant herein challenged the statutes and decisions in the New York Courts and asked for reversal which has been refused by the New York Court of Appeals.

The Attorney General's claim that even assuming reconsideration below, the same finding would form the basis of

decision whether the statutes were read to authorize awards only to wives or if read gender neutral, ignores and misunderstands the holdings of this Court in ORR and CHILDS, supra. A court in deciding a case should certainly know the law.

The Attorney General's belief, that the affirmance by the Appellate Division, First Department, without opinion, applies the correct principals of law when such courts have never spoken, cuts off all argument by the appellant. Is silence the interpretation of the law? Taken together with the New York Legislature's long delay in amending New York law to gender neutral character forecloses all appeals, which violates appellant's constitutional rights. However, the New York Legislature subsequently acted, the new law became effective on or about July 22, 1980, wherein New York finally effected new divorce, alimony, et al., statutes. Such recent complete change in New York Law after this Court's decision, clearly demonstrates appellant's obligations under the old statutes to be unconstitutional. The highest Appellate Courts of New York were waiting for the Legislature to act, except the Appellate Division, Second Department, which had already been mandated to make earlier interpretation by a remand from this Court. The new New York Law is not retroactive. In order to grant appellant his constitutional rights this Court must force the Appellate Division, First Department, and the New York Court o

Appeals to apply ORR and CHILDS, supra . Unless there is a reversal and an order to the Court of Appeals and Appellate Division, First Department, as there had been to the Appellate Division, Second Department, in the CHILDS case, supra, the appellant will be denied his constitutional rights because he was in-between the law. A finding of substantial constitutional issues and remand to the New York Court of Appeals would require a determination of the issues herein for all of New York State as a decision of this Court would so determine the issue for all of the United States.

The multitudinous number of judges and referees hearing this case, denied due process to appellant. The court should note that appellant, a disabled, retired fireman, could not afford to appeal from every order and decision in this extended litigation. The record clearly shows that the Referee appointed to hear evidence and report to the Court, did not hear the case. Another Referee never appointed by Court order, heard testimony and reported to the Court. How can the Attorney General disclaim this if he was never there. The trial Judge and Appellate Courts never decided the issues of appointment. The trial judge without hearing evidence, based his decision entirely on the undesignated referee's report. Such denial of access to a duly authorized court is a denial of due process of law. Thus the Attorney General is not in a position to argue this point as he is an intervenor as to the constitutionality of

the statutes and therefore has no standing on this matter.

CONCLUSION

THE APPEAL SHOULD BE HEARD WITH PROBABLE JURISDICTION NOTED, OR IN THE ALTERNATIVE, THE ORDER BELOW SHOULD BE REVERSED.

Dated: Bronx, New York
August 6, 1980

Respectfully submitted,

DANIEL K. ETTINGER, ESQ.
Attorney for Appellant
Address & P.O. Address
10 West Fordham Road
Bronx, New York 10468

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney Pro Se,
Intervenor-Appellee

SHIRLEY ADELSON SIEGEL
Solicitor General

ROBERT J. SCHACK
Assistant Attorney General
of Counsel

ROBERT KIERNAN
Attorney for Appellee
of Counsel

DAVID ARENS
Attorney for Appellee